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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. **712** 38

JULIUS SALSBERG,

Appellant,

VS.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE APPELLANT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. 712

JULIUS SALSBERG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The first opinion of the Court of Appeals of Maryland, which decided that the constitutionality of the challenged statute was squarely presented for decision in the case of this Appellant, is reported in 93 A. 2d 280. The second opinion of the Court of Appeals of Maryland, which decided in favor of the validity of the challenged statute is reported in 94 A. 2d 280. Both of said opinions are printed in the Record (R. 15, 18).

JURISDICTION

The final judgment of the Court of Appeals of Maryland sought to be reviewed was entered on February 5, 1953 (R. 27). The application for appeal to the Supreme Court was presented on March 26, 1953. On May 18, 1953, the Supreme Court noted "probable jurisdiction" and placed the case on the Summary Docket for argument (R. 33).

In this case there was drawn in question the validity of a statute of the State of Maryland, hereinafter set forth, on the ground of its being repugnant to Section 1 of the 14th Amendment of the Constitution of the United States. The Appellant was on trial in the Circuit Court for Anne Arundel County charged with committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The admissibility of the evidence upon which Appellant was ultimately convicted depended upon the constitutional validity of the challenged statute, and the decision and judgment of the Court of Appeals of Maryland (being the highest court in the State) were in favor of its validity. The jurisdiction of the Supreme Court to review this decision and judgment by appeal is conferred by Title 28, United States Code, Section 344(a) (28 U. S. C. A., 1257(2)). The following decisions sustain the jurisdiction of the Supreme Court to review the decision and judgment on appeal in this case: *Ward v. Maryland*, 12 Wall. 418, 423, 424 (1871); *Home Insurance Co. v. Augusta, Ga.*, 93 U. S. 116, 121 (1876); *Foster v. Kansas*, 112 U. S. 201, 205, 206 (1884); *Cissna v. Tennessee*, 246 U. S. 289, 293, 294 (1918); *Chicago, R. I. & P. R. Co. v. Perry*, 259 U. S. 548, 551, 552 (1922); *New York v. Zimmerman*, 278 U. S. 63, 67-69 (1928); *Charleston Fed. Sav. & L. Assoc. v. Alderson*, 324 U. S. 182, 185-186 (1945); *Illinois v. Board of Education*, 333 U. S. 203, 206 (1948); *Kedroff v. St. Nicholas Cathedral*, 97 L. Ed. (Advance) 95, 98 (1952).

QUESTIONS PRESENTED

1. Is it a violation of the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States for the Legislature of Maryland to amend a statute of state-wide application, which renders inadmis-

sible in the trial of a misdemeanor any evidence procured as a result of an illegal search and seizure, by providing that such evidence shall be admissible in such a trial in a single county of the State, where no reasonable ground of difference exists between conditions in the territory selected for exemption and conditions elsewhere in the State?

2. Was the Appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for a misdemeanor in the Circuit Court for Anne Arundel County (in accordance with the exemption contained in the amendatory statute now being challenged) of illegally procured evidence, notwithstanding the law renders illegally procured evidence inadmissible in trials for the same offense elsewhere in the State of Maryland?

3. Was the Appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for the misdemeanor of "gambling" in Anne Arundel County (in accordance with the exemption contained in the challenged statute) of illegally procured evidence notwithstanding the law renders illegally procured evidence inadmissible in trials for all other misdemeanors in the same County and in trials for the same offense of "gambling" where the prosecution is under the local gambling laws of said County?

4. Was the Appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial in Anne Arundel County for the misdemeanor of making book on the result of horse races (in accordance with the exemption contained in the chal-

lenged statute) of illegally procured evidence notwithstanding the law renders illegally procured evidence inadmissible in trials for the misdemeanor of conducting a lottery in the same County?

5. Does the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States apply so as to prohibit a State from making territorial classifications for the administration of justice and judicial procedure for different portions of the State, which said classifications are arbitrary, do not rest upon some reasonable ground of difference between conditions in the territory selected and conditions elsewhere in the State and do not bear a fair and substantial relation to the object of the legislation?

6. Does the subject matter of the challenged statute impinge upon a fundamental right implicit in the concept of ordered liberty so that it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation?

7. All the points raised in the Assignment of Errors are also presented. The Questions Presented as stated above set forth the major issues.

STATUTE INVOLVED

The Maryland statute involved, the validity of which was sustained by the Court of Appeals of Maryland, is Acts of 1951, Chapter 704, which, as further amended by Acts of 1951, Chapter 710, is codified as Article 35, Section 5, Code of Public General Laws of Maryland, 1951 edition. The pertinent provisions of said statute are as follows:

"No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal

search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case; * * *. Provided, further that nothing in this section shall prohibit the use of such evidence in *Anne Arundel, Wicomico and Prince George's Counties* in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." (Italics supplied.)

The words italicized, which brought Wicomico and Prince George's Counties within the exemption of the proviso, were added by Acts 1951, Chapter 710. The proviso itself was originally enacted by the challenged statute (Acts 1951, Chapter 704) as an amendment to the then existing law, and, as so enacted, it applied only to Anne Arundel County. As thus finally amended by the two acts of 1951, 20 of the 23 Counties of the State and Baltimore City, which is an autonomous municipality not within any County, are not affected by the proviso so that illegally procured evidence remains inadmissible in the trial of gambling cases in those jurisdictions.

It is important to note that the exempting proviso applies only in prosecutions "for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27", which is a reference to the state-wide gambling laws. Anne Arundel County has a local gambling statute (Art. 2, secs. 292, 293, Code of Public Local Laws of Maryland, 1930) which is not included in the proviso. Thus in prosecutions in Anne Arundel County for a violation of the local gam-

bling statute, illegally procured evidence remains inadmissible.

It is of further importance to observe that the aforementioned sections 303-329 do not include the state-wide lottery laws which are contained in sections 423-438, 642-651, of Article 27, Maryland Code, 1951. Thus in Anne Arundel County illegally procured evidence is admissible against persons who indulge in the forms of gambling proscribed by sections 303-329,¹ but it remains inadmissible against persons who engage in a prohibited lottery.

¹ The following is a brief abstract of the forms of gambling prohibited under Art. 27, secs. 303-329, Md. Code, 1951:

Sec. 303. Prohibits the keeping of a gaming table, house, etc., for the purpose of gambling.

Sec. 304. Defines gaming table.

Sec. 305. Prohibits the leasing of a house, etc., for gambling.

Sec. 306. Prohibits betting and making book on the result of horse races.

Sec. 307. Exempts betting and book making on horse races conducted within the grounds of a licensed agricultural association.

Secs. 308-310. Licensing regulations under section 307.

Sec. 311. Prescribes the penalty for keeping a gaming table.

Sec. 312. Prescribes the penalty for owners and tenants of property who permit keeping of a gaming table.

Sec. 313. Authorizes recovery in action at law of money lost at a gaming table.

Sec. 314. Further definition of gaming table.

Sec. 315. Prescribes the penalty for playing "Thimbles", "Little Joker" and "Craps."

Sec. 316. Provides for liberal construction of preceding sections.

Secs. 317-319. Exempts bingo games conducted for charity in certain counties.

Secs. 320-323. Exempts raffles, etc. held by certain patriotic, religious and charitable organizations in certain counties.

Secs. 324-325. Exempts bingo games in Washington County and Baltimore City where prize is limited.

Sec. 326. Self-incrimination no ground for refusal to testify in connection with prosecution under preceding sections, but grants witness immunity from prosecution.

Sec. 327. Requires police to visit suspected places and enforce the law.

Secs. 328-329. Search warrant law.

STATEMENT OF THE CASE

The Appellant was convicted by the Circuit Court of Anne Arundel County of committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The evidence upon which he was convicted was admittedly procured as a result of an illegal search and seizure by the police of Anne Arundel County, and its admissibility was dependent upon the constitutional validity of the challenged statute.

Prior to the trial on the merits, Appellant filed a motion to suppress the evidence. The testimony taken in support of the motion disclosed that on the afternoon of May 21, 1952, Captain Wilbur C. Wade, of the Anne Arundel County Police force, in company with other officers, approached a small one room building in the rear of a certain garage situated on the Governor Ritchie Highway, Anne Arundel County, Maryland. It was stipulated that no search warrant had been issued for the invasion of these premises. The door to the premises was locked. Captain Wade admitted that he could not see into the premises because the window was painted, and that he could not hear any sounds coming from the room. All that the officers saw were some telephone wires leading into the premises. They tried to get someone to come to the door and open it, but no one answered. The police then forced the door open with an axe. The Appellant was found in the room. A search of the room revealed incriminating evidence which was seized by the police. Captain Wade made no pretense at justifying his forceable entry into the premises on the basis of any preliminary sensory discovery indicating commission of a crime. He frankly admitted that he broke into the room solely "upon the advice of the State's Attorney" (R. 7, 8).

The trial Court in stating the problem before it said that if the challenged statute were valid the police "would have a right to go into the premises on the assumption the Amendment of the Bouse Act gave them that right." (Italics supplied) (R. 5). Thereafter the trial Court overruled the motion to suppress the evidence, impliedly holding that the challenged statute was constitutional. (See 93 A. 2d at p. 282, where the Court of Appeals of Maryland said: "The fair implication * * * is that the motions were overruled because the act was held constitutional * * *".)

At the trial on the merits the timely objections of Appellant to the introduction of the evidence were overruled. The trial Court, sitting without a jury, found Appellant guilty as charged and sentenced him to six months in the Maryland House of Correction and to pay a fine of one thousand dollars and costs.

The Appellant had been tried jointly with two other defendants (Joseph John Rizzo and Wm. Raymond Nicholson), who were also convicted and who received the same sentence, and all three defendants perfected an appeal to the Court of Appeals of Maryland. In the first opinion of the Court of Appeals of Maryland (93 A. 2d 280), the judgment and sentence of the trial Court was affirmed as to the other two defendants because it was held that they had no interest in the premises searched and therefore had no status to object to the illegal search and seizure. The Appellant, Julius Salsburg, however, was found to have a proper interest in the premises and the constitutional question only was ordered reargued as to him. Following the reargument, the Court of Appeals of Maryland held the challenged statute valid and affirmed the judgment and sentence as to the present Appellant, Julius Salsburg. The present appeal, therefore, is solely on behalf of Julius Salsburg.

SPECIFICATION OF ERRORS

The errors intended to be urged are the same as appear in the Assignment of Errors printed in the Record (R. 28-31).

SUMMARY OF ARGUMENT

The challenged statute (Chapter 704, Acts 1951) involves a triple classification. The first or primary classification is territorial in its effect by exempting one County of the State from the state-wide statutory rule of exclusion of illegally procured evidence in misdemeanor cases. The secondary classification selects for discrimination violations of the state-wide "Gaming" laws, (a misdemeanor), leaving all other misdemeanors committed within the one County in question subject to the state-wide rule of exclusion. The third classification selects for discrimination persons charged with violating the state-wide gambling laws, leaving persons charged with violating the local gambling laws in the one County in question free to enjoy the statutory rule of exclusion. Also inherent in this third classification is the discrimination against persons who indulge in certain specified forms of gambling, leaving violators of the state-wide lottery laws free to enjoy the statutory rule of exclusion. All three of the classifications are purely arbitrary. The primary classification is not supported by any reasonable difference between conditions in the territory selected for discrimination and elsewhere in the State. The secondary classification is not supported by any rational difference between particular classes of misdemeanants in Anne Arundel County which would support the discrimination against suspected gamblers. The third classification is not supported by any rational difference between violators of the state-wide gambling laws and violators of the similar local law nor between book-makers and lottery operators. None

of the classifications bears any reasonable or valid relation to the object sought to be accomplished by the challenged statute, which, as the State concedes, is none other than to facilitate the apprehension and conviction of suspected gamblers in Anne Arundel County. Here the relation to the object sought to be accomplished is patently grounded upon the pernicious assumption that the challenged statute confers the "right" and "direction" to search and seize in violation of the citizen's constitutional immunity. Under the doctrine of *Wolfe v. Colorado*, 338 U. S. 25 (1949), this assumption involves a denial of Due Process. The means to the otherwise justifiable end is thus illegal, and it cannot be considered just or reasonable for the purpose of supporting the classification. The State, however, argues that the challenged statute contains no affirmative sanction to invade the constitutional immunity against illegal search and seizure and that it was not intended as a direction to the police to search and seize without regard to the constitutional rights of the citizen. If the correctness of this contention be assumed, it then becomes evident with piercing clearness that the challenged statute and the classifications it makes are utterly pointless and without any imaginable relation to the legislative objective of facilitating the apprehension and conviction of suspected gamblers in Anne Arundel County. Especially is this so in view of the fact that violators of the local gambling laws in Anne Arundel County and violators of the state-wide lottery laws remain secure in the full enjoyment of their constitutional immunity against unreasonable search and seizure.

The Court of Appeals of Maryland made no attempt to find even a debatable rational basis to support the discrimination inherent in the challenged statute. It took the view that the statute did no more than prescribe a rule of evidence which fell in the category of territorial arrangements

for the administration of justice and judicial procedure in different portions of the State. On the authority of *Missouri v. Lewis*, 101 U. S. 22 (1880), the Court of Appeals in effect concluded that the Equal Protection Clause did not apply to such arrangements and that the classifications involved were not subject to the otherwise basic requirements that class legislation must not be arbitrary, must be founded upon a reasonable ground of difference and must bear a reasonable and valid relation to the object sought to be accomplished by the statute. This is a clear distortion and misinterpretation of the doctrine established by *Missouri v. Lewis*. That case, as well as the numerous decisions of the Supreme Court and of State courts which have quoted and relied upon it, firmly establish that the basic requirements of "a reasonable ground of difference" and "a reasonable relation to the object sought to be accomplished" apply equally in every case of classification, whether the subject matter of the legislation involves taxation, licensing, economic activities or judicial administration and procedure. Rules of evidence are not immune from applicable constitutional limitations, and this Court has expressly so held. *Mobile, etc. R. R. v. Turnipseed*, 219 U.S. 35, 43 (1910).

Illustrative of the Appellant's contention are two decisions closely analogous to the case at Bar of an intermediate appellate court of New York which, relying on *Missouri v. Lewis*, invalidated a discriminatory rule of evidence prescribed by statute because there was no reasonable ground of difference between the territory selected and the territory excluded. *Krushel v. Ladutko*, 11 N. Y. S. 2d 717 (1939); *Commissioner of Public Welfare v. Torres*, 31 N. Y. S. 2d 101 (1941).

The presumption of reasonableness and constitutionality which generally attends a legislative enactment cannot

save the challenged statute because the classifications it proposes are manifestly and obviously arbitrary and unreasonable on their face. In addition, the subject matter of the statute impinges upon one of the most fundamental immunities of the citizen, and it is settled by the decisions of this Court that a presumption of validity does not apply to such a statute.

ARGUMENT

I.

Legislative History of the Challenged Statute

Prior to the enactment of Chapter 194, Acts of 1929 (now codified, as subsequently amended, in Art. 35, Sec. 5, Md. Code, 1951) the Maryland Court of Appeals rejected the federal rule of exclusion of illegally procured evidence, and such evidence was admitted in criminal trials involving all categories of crime. *Meistager v. State*, 155 Md. 195 (1928). As a result of this decision, the Legislature enacted Chapter 194 of the Acts of 1929, popularly known as the Bouse Act. This statute, which was state-wide in its application, rendered such evidence inadmissible in the trial of all misdemeanors, thus partially adopting the federal rule of exclusion. As to prosecutions for felonies the old rule of admissibility remained the same and is still in force. *Marshall v. State*, 182 Md. 379 (1943); *Delnegro v. State*, 81 A. 2d 241 (Md. 1951). Thus Maryland adopted a hybrid position on the important question of how best to secure to the citizen his fundamental right of security against arbitrary intrusion upon his privacy by the police.

Following the enactment of the Bouse Act, the Court of Appeals of Maryland characterized it by saying that it "fairly summed up" the immunities guaranteed by Articles 22 and 26 of the Maryland Declaration of Rights, which

are in *pari materia* with the 4th and 5th Amendments to the Constitution of the United States. *Bass v. State*, 182 Md. 496, 500 (1943). Somewhat earlier, the same Court warned that "An examination of the statute books of the Federal Government and the states demonstrates the necessity for these constitutional barriers because they indicate a ceaseless steady pressure on the part of government to lessen the difficulty of convicting persons charged with crime by encroaching on these immunities". *Miller v. State*, 174 Md. 362, 370 (1938). The "ceaseless pressure" alluded to was successfully resisted in Maryland for almost 20 years after the enactment of the Bouse Act. However, in 1947 a small hole was made in the partial dike erected by the Bouse Act when the Baltimore County Delegation in the Maryland Legislature succeeded in securing the enactment of Chapter 752 of the Acts of 1947, which amended the Bouse Act so that — "nothing in this section shall prohibit the use of such evidence in Baltimore County in the prosecution of any person for unlawfully carrying a concealed weapon". At the 1951 session of the Legislature, other local delegations succeeded in enlarging the breach by securing the enactment of Chapter 145 of the Acts of 1951, whereby Baltimore City and thirteen counties joined Baltimore County in the exemption of concealed weapons cases. At the same session, the Anne Arundel County delegation secured the passage of the amendatory statute now being challenged (Ch. 704, Acts 1951) and the Wicomico and Prince George's Counties delegations joined Anne Arundel County by securing the passage of Chapter 710 of the Acts of 1951. At the 1952 session of the Maryland Legislature, Chapter 59 of the Acts of 1952 was enacted whereby a new section was added to the law, making the exemption from the Bouse Act of concealed weapons cases state-wide in its application (Art. 35, Sec. 5A, Md. Code,

1951)).² There are no recorded legislative debates pertaining to Chapter 59 of the Acts of 1952 disclosing the considerations which prompted its passage. However, it is a fair statement to say that its purpose was to make the "concealed weapons" exemption from the Bouse Act state-wide in its application in order to eliminate any question of a violation of the Equal Protection Clause of the 14th Amendment of the Constitution of the United States. The point had never been formally raised and adjudicated, but many leading members of the Maryland Bar had often expressed serious doubts on the point. (For a similar legislative procedure, making a special rule of evidence in paternity cases state-wide in its application after a statute confining its operation to New York City had been declared unconstitutional by an intermediate appellate court, see *Commissioner of Public Welfare v. Koehler*, 30 N. E. 2d 587, 590 (N. Y. 1940), referring to *Krushel v. Ladutko*, 11 N. Y. S. 2d 747, 749.)

² At the 1953 session of the Maryland Legislature, (Chs. 84, 419, 581) Howard, Cecil and Worcester Counties joined Anne Arundel, Wicomico and Prince George's Counties in the exemption from the otherwise state-wide rule of exclusion of illegally procured evidence in gambling cases, and Wicomico County was given an exemption in prosecutions for violations of the alcoholic beverage laws. These amendments do not apply to or affect the case at Bar. They are referred to here primarily for the purpose of bringing the legislative history of the basic Bouse Act up to date. It may also serve to demonstrate the wholly irrational, haphazard and piecemeal manner in which the Legislature has dealt with one of the most basic and fundamental rights of the citizen.

II.

The Triple Classification Established by the Challenged Statute is Arbitrary and Unreasonable on its Face. It is not Supported by the Basic Requirements of all Class Legislation That There be "A Reasonable Ground of Difference" and "A Reasonable Relation to the Object Sought to be Accomplished".

In the case at Bar, the only statute before the Court is Chapter 704 of the Acts of 1951 which involves a triple classification. The first or primary classification is territorial in its effect by exempting one County of the State from the state-wide statutory rule of exclusion of illegally procured evidence. The secondary classification selects for discrimination violations of the state-wide "Gaming" laws, leaving all other misdemeanors committed within the one County in question subject to the state-wide rule of exclusion. The third classification selects for discrimination persons charged with violating the state-wide gambling laws, leaving persons charged with violating the local gambling laws in the one County in question free to enjoy the statutory rule of exclusion. In addition, this third classification selects for discrimination persons who indulge in certain specified forms of gambling, leaving violators of the state-wide lottery laws free to enjoy the statutory rule of exclusion.

The State has argued that the challenged statute does no more than reinstate the former judicial rule of evidence which held illegally procured evidence admissible and which this Court in *Wolfe v. Colorado*, 338 U. S. 25 (1949) held did not in itself violate the Due Process Clause of the 14th Amendment. This argument misconceives the point in the case at Bar. There is no question involved here as to the power of the State of Maryland to repeal in toto

the legislative evidentiary rule of exclusion embodied in the Bouse Act, and thereby revert to the former judicial rule of inclusion for misdemeanor cases as well as for felonies. Such action would not involve class legislation with the concomitant necessity, as in the case at Bar, of finding a "reasonable ground of difference" to support the discrimination inherent in the challenged statute. In the case at Bar, the basic challenge to the statute involved is grounded upon the fact that all three of the classifications which it makes are arbitrary and without any rational basis to support them, and, therefore, it deprives the Appellant of the equal protection of the laws as provided in Section 1 of the 14th Amendment of the Constitution of the United States. Nor is there any question here of a denial of Due Process except to the extent that the challenged statute may be construed as affirmatively sanctioning an arbitrary invasion of the citizen's immunity from unreasonable search and seizure. *Wolfe v. Colorado*, 338 U. S. 25 (1949). The extent to which the statute contains such an affirmative sanction will be discussed later in this brief.

At the two oral arguments in the Court of Appeals of Maryland, it was virtually conceded by the State that there was no difference between conditions in Anne Arundel County and elsewhere in the State which would furnish a reasonable basis for the discrimination inherent in the challenged statute. The principal contention of the State was that the only authorities in point here are those dealing with the right of a State to make territorial discriminations in regulating the administration of justice and judicial procedure within its boundaries. The State's greatest reliance was upon *Missouri v. Lewis*, 101 U. S. 22 (1880), and the decisions of the Supreme Court which have cited and followed it. From these decisions, the State distilled a principle, the essence of which is that in cases involving the

administration of justice and judicial procedure the admitted power to set up territorial classifications is not subject to the otherwise basic requirement that class legislation must not be arbitrary and must be founded upon a reasonable difference between conditions in the territory selected and elsewhere in the State. The Court of Appeals of Maryland adopted this distorted view of *Missouri v. Lewis*. In sustaining the statute now challenged, the Court, relying upon *Missouri v. Lewis*, expressly held that the Equal Protection Clause of the federal Constitution, "has no reference to municipal or territorial arrangements made for different portions of the State" (94 A. 2d at p. 284). After making this flat statement, the Court sought to temper its clear implication by paying lip service to the requirement of "reasonableness". The arrangements in question should not, the Court added, "injuriously affect or discriminate between persons or classes of persons within the municipalities or counties for which such regulations are made" (Ibid.). However, the Court made no attempt to point out any possible difference between prohibited gambling in Anne Arundel County and elsewhere in the State. Indeed, it must be conceded that the odds on the "Bob-tailed Nag" are the same whether the bet is made in Annapolis (Anne Arundel County) or Cumberland (Alleghany County) or Baltimore City. The mathematical odds on making a "Seven" remain constant no matter where the dice are rolled. The Court gave no indication that any difference existed between book-makers and lottery operators. Nor did the Court make even a passing reference to any possible difference in Anne Arundel County between various misdemeanors which might justify treating persons charged with gambling in that County differently from those malefactors who operate bawdy houses, illegal stills or engage in a conspiracy to commit the most heinous crime there (all being misdemeanors).

This clear misinterpretation of *Missouri v. Lewis*, has already received critical comment in at least one law journal (33 Boston University Law Rev. 410). In that case, the Supreme Court of the United States sustained the validity of a Missouri statute and constitutional provision which allowed an appeal to the highest court of that State from a final judgment of the Circuit Courts of certain Counties. Other Counties were excepted from these provisions, and a separate appeal court was provided for them. The language of the opinion, which was relied upon by the Court of Appeals of Maryland in the case at Bar, was nothing more than an abstract statement of the principle which sustained the power to set up territorial classifications and which, for the purpose of its statement, ignored or rather assumed the requirement that there be some reasonable basis for the discrimination. The abstract statements contained in *Missouri v. Lewis*, which have been frequently quoted and relied upon, are authority only for the power to classify, and they have no bearing on the important question of reasonableness. In any case of classification, whether the subject matter of the legislation involves taxation, licensing, economic activities or judicial administration and procedure, two questions are invariably presented and must be determined. The first question is the power to classify and the second is the reasonableness of the particular classification. In the recent case of *Maryland Coal and Realty Co. v. Bureau of Mines*, 193 Md. 627 (1949), the Court of Appeals recognized the dual problem and struck down an arbitrary and unreasonable territorial classification even though the power to classify the particular subject matter was found to exist.³ However, in the

³ In the case cited the statute purported to regulate the "strip mining" of coal on a state-wide basis. Garrett County was excepted from the operation of the law. The Court held the exclusion of

case at Bar, the Court of Appeals of Maryland, while correctly holding that the power to classify existed, ignored its decision in the case last cited and erroneously concluded that since the subject matter of the challenged statute related to judicial administration and procedure it was not necessary to find *reasonableness* because the Equal Protection Clause of the federal Constitution does not apply to such territorial arrangements.

Missouri v. Lewis does not support such a conclusion. Indeed, practically all the Supreme Court decisions which cite and rely upon *Missouri v. Lewis* either assume "reasonableness" of the classification without discussion because it was immediately suggested to the most ordinary intelligence and perception or expressly found its existence in the unequal distribution of population in the territories affected. For illustrations of the former category, see: *Maxwell v. Dow*, 176 U. S. 581 (1900); *Mallett v. North Carolina*, 181 U. S. 589 (1901); *Gardner v. Michigan*, 199 U. S. 325 (1905); *Graham v. W. Virginia*, 224 U. S. 616

Garrett County invalidated the statute even though it was otherwise a valid exercise of the State's police powers. The Court said (193 Md. at 642-3):

"But it is equally clear that the power of the Legislature to restrict the application of statutes to localities less in extent than the State, as the exigencies of the several parts of the State may require, cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, *unless there is some difference between conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification.* *Dasch v. Jackson*, 170 Md. 251, 270.

"* * * *There is no difference in conditions that would make strip mining a menace to public health and safety in Allegany but harmless in Garrett. There is no rational basis for the territorial classification for discrimination between Garrett and Allegany Counties. It violates the equal protection clause of the Fourteenth Amendment and article 23 of the Maryland Declaration of Rights*" (Italics supplied).

(1912); *Ocampo v. United States*, 234 U. S. 91 (1914); *Ohio v. Akron Metrop. Pk. Dist.*, 281 U. S. 74 (1930).⁴ For illustrations of the second category, see: *Hayes v. Missouri*, 120 U. S. 68 (1887); *Morris v. Alabama*, 302 U. S. 642 (1937), a per curiam dismissal of an appeal from the highest court of Alabama, whose opinion in 175 So. 283

⁴ *Mollett v. N. Carolina*, 181 U. S. 589 (1901), where the allowance of an appeal to the State from a ruling of the Criminal Court of one district granting defendant a new trial but not from the Criminal Court of another district was held not to be a denial of equal protection. There was no reference to or discussion of the question of "reasonableness." The statute in question having been passed subsequent to commission of the offense, the principal question was whether it amounted to an ex post facto law. In discussing this question the Court used language which points up the difference between the subject matter of the N. Carolina law before it and the statute now at Bar. The former, the Court held, involved no "substantial right or immunity possessed" by the accused (181 U. S. at 597).

Ocampo v. United States, 234 U. S. 91 (1914) involved a construction of the Constitution of the Philippine Islands and held that a statute which denied a preliminary examination to persons charged with crime in Manila was not a denial of equal protection under their constitution, although such right was accorded to persons charged with crime elsewhere in the Islands. The statute in question, however, provided other safeguards to the inhabitants of Manila by restricting its application to cases where "the prosecuting attorney, after a due investigation of the facts, shall have presented an information against the accused". (An analogy may be found in the statutory provisions of Maryland which permit trial in the counties on the original warrant — as was done in the case at Bar — while requiring formal presentment and indictment by a Grand Jury in Baltimore City for the same offense. *Callahan v. State*, 156 Md. 459 (1929).) The Court quoted *Missouri v. Lewis* only to show there was power to make territorial classifications. "Reasonableness" of the classification was assumed without discussion, presumably, on the very obvious basis of the difference between Metropolitan Manila and the sparsely settled and sometimes primitive conditions existing in other parts of the Philippine Islands.

Ohio v. Akron Metrop. Pk. Dist., 281 U. S. 74 (1930), where the Court held equal protection was not denied by a provision of the Ohio constitution which prohibited the Ohio Supreme Court from declaring any statute unconstitutional without the concurrence of at least all but one of the judges except in the affirmance of a judgment of a lower Court declaring a law unconstitutional. No question

expressly found reasonableness in the classification based on population differences; *Fort Smith v. Board of Improvement*, 274 U. S. 387, 391 (1927); *Jannett v. Windham*, 290 U. S. 602 (1933), a per curiam affirmance of an appeal from the highest court of Florida, whose opinion in 147 So. 296, expressly held that in view of the population differences involved "the provisions of the statute are based on a just and reasonable classification with reference to the subject regulated".⁵

of territorial classification was involved because "the provision of the State constitution which is attacked is one operating uniformly throughout the entire State" (281 U. S. at 81).

The same is true of *Graham v. W. Virginia*, 224 U. S. 616 (1912), where an "habitual criminal" statute was sustained; and of *Maxwell v. Dow*, 176 U. S. 581 (1900), which sustained a state-wide statute providing for a jury of 8 instead of 12 in non-capital criminal cases.

Gardner v. Michigan, 199 U. S. 325 (1905), sustained a statute which provided for the compiling of jury lists by appointed officials in one county whereas the lists were compiled by elected officials in other parts of the State. The Court quoted from *Missouri v. Lewis* merely to show that the power of a State to make territorial classifications was firmly established. There was no reference to or discussion of the question of "reasonableness". It was obviously assumed on the basis of population or other legitimate differences prevalent in the district affected.

⁵ *Hayes v. Missouri*, 120 U. S. 68 (1887), sustained a statute giving the State 15 peremptory jury challenges in cities with over 100,000 population and 8 challenges elsewhere in the State. The Court expressly found that population differences furnished the requisite "reasonable basis" for the classification. Thus at page 71, Justice Field said: "In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors. And to that end it may be a wise proceeding on the part of the legislature to enlarge the number of peremptory challenges in criminal cases tried in those cities."

Morris v. Alabama, 302 U. S. 642 (1937), was a per curiam dismissal of an appeal from the highest Court of Alabama for want of a substantial federal question, citing *Missouri v. Lewis*. The opinion of the Court of Appeals of Alabama is found in 175 So. 283, and it shows that the statute in question provided different methods of

The Supreme Court has clearly and expressly recognized that the abstract statement of the power to classify as laid down in *Missouri v. Lewis* is subject to the qualification that there must be a reasonable basis for the classification. In addition to the cases cited above, attention is directed to *Atchison, Topeka, etc. Rwy. Co. v. Matthews*, 174 U. S. 96, 105, 106 (1899), where the Court expressly cited *Missouri v. Lewis* as belonging in that category of cases where the statute in question was sustained because there appeared to be some reasonable basis for the classification and where the Court said: "Even where the selection is not obviously arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished the same conclusion of unconstitutionality is affirmed." To the same effect is *Truax v. Corrigan*, 257 U. S. 312, 336

jury selection in criminal cases in different Counties of the State which were classified according to population. Population difference was the express basis of the Alabama Court's finding of "reasonableness" in the classification.

Jannett v. Windham, 290 U. S. 602 (1933), was a per curiam affirmance (citing *Missouri v. Lewis*) of a decision of the highest Court of Florida which sustained a statute imposing certain restrictions on small loan companies operating in Counties having a population of 40,000 or more. Companies operating elsewhere were exempt from the restrictions. The majority opinion of the Florida Court (147 So. 296) expressly held that "the provisions of the statute are based on a just and reasonable classification with reference to the subject regulated." Cf. dissenting opinion of one of the judges.

In *Fort Smith v. Board of Improvement*, 274 U. S. 387, 391 (1927) the Court expressly found a "reasonable basis" to support a classification which imposed an assessment upon certain street railways for street paving while exempting others. After citing *Missouri v. Lewis* for the proposition that the "14th Amendment does not prohibit legislation merely because it is special or limited in its application to a particular geographical or political subdivision of the State", the Court said: "Nor need we cite authority for the proposition that the 14th Amendment does not require the uniform application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination" (Italics supplied).

(1921). In the dissenting opinion of Justice Brandeis in *Louisville Gas Co. v. Coleman*, 277 U. S. at 44, footnote 1, *Missouri v. Lewis* is expressly catalogued with cases which have sustained classifications based on population differences. In *Holden v. Hardy*, 169 U. S. 366, 388, 389 (1898), after quoting from *Missouri v. Lewis* to show that each State has the right and power to adopt any system of laws or judicature it sees fit for any part of its territory, the Supreme Court said, at p. 389:

"We do not wish, however, to be understood as holding that this power is unlimited. * * * the 14th Amendment contains a sweeping provision forbidding the states from * * * denying * * * the benefit of due process or equal protection of the laws."

Brown v. New Jersey, 175 U. S. 172 (1899) contains a similar statement.*

It is thus apparent that the Court of Appeals has misinterpreted the decision in *Missouri v. Lewis*. However

* At page 175 of 175 U. S., Mr. Justice Brewer said:

"The State has full control over the procedure in its Courts, both in civil and criminal cases; subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

The Court's attention is directed to the fact that on the State's brief in support of its motion to dismiss this Appeal (p. 13) *Brown v. New Jersey* was cited to support its position in the case at Bar, and the following language was quoted from page 177 of 175 U. S.: " * * * A State may make different arrangements for trials under different circumstances of even the same class of offenses * * * " From this the State concluded at page 13 of its brief in support of its motion to dismiss this appeal: "Certainly, therefore, if there may be a discrimination within the same class of offenses, there is no reason why the Legislature could not discriminate between different classes of offenses." The quotation from *Brown v. New Jersey*, relied upon by the State, is taken out of context and does not support the principle of classification contended for by the State. Indeed, at page 177, Mr. Justice Brewer said that the case did not involve territorial or any other type of classification. The challenged statute provided that in all criminal cases where the trial is before an "ordinary jury" each side should have 20 peremptory challenges but where it is before a "struck jury" the number of such challenges

broad the power of a State to set up territorial classifications with respect to systems of laws or judicature, it is subject to the requirement of reasonableness inherent in the Equal Protection Clause of the 14th Amendment. In the cases cited and referred to above, the practical necessities of judicial administration in dealing with a population unequally distributed over a State was the very basis for sustaining (either expressly or impliedly) statutes setting up a variety of criminal or appellate courts, regulating the right to a jury trial or the State's right to appeal, and specifying the political sub-divisions in which preliminary hearings in criminal cases are or are not allowed, etc. In the case at Bar there are no such considerations to sustain the challenged statute. Population differences are wholly irrelevant and bear no reasonable relation to the subject matter of the challenged statute. (See *Commissioner of Public Welfare v. Torres*, 31 N. Y. S. 2d 101 (1941), hereinafter discussed.) This is clearly demonstrated by the fact that if the defendant procures a change of venue, and the trial is held in a non-exempt County, regardless of its size, the defendant would be entitled to the benefit of the statutory rule of exclusion applicable in the latter jurisdiction. At the first oral argument of this case in the Court of Appeals of Maryland, Chief Judge Charles Markell (who was retired after writing the first opinion in this case,

was limited to 5. In answer to the claimed denial of equal protection, Mr. Justice Brewer said (p. 177):

"* * * in all cases in which a struck jury is ordered, the same number of challenges is permitted, as similarly in all cases in which the trial is by an ordinary jury. Either party, state or defendant, may apply for a struck jury, and the matter is one which is determined by the Court in the exercise of a sound discretion. There is no mere arbitrary power in this respect, any more than in the granting or refusing a continuance. The fact that in one case the plaintiff or defendant is awarded a continuance and in another is refused does not make in either a denial of the equal protection of the laws."

93 A. 2d 280, and who was no longer on the bench when the case was reargued) expressly stated that he could not see any possible difference in relation to the subject matter at Bar between Anne Arundel County and those Counties which bordered upon it, such as Calvert and Howard Counties, which might justify different treatment. He pointedly asked the Assistant Attorney General, who argued the case for the State of Maryland—appellee, whether he could suggest any such difference. The Assistant Attorney General frankly admitted that he could not.

However, in the State's brief in support of its motion to dismiss this appeal (pp. 12-13), the Attorney General of Maryland declared that a number of reasons could be conceived to justify the challenged classification. One of these, it was suggested, was the recent influx of gamblers into Anne Arundel County (of which, incidentally, there was no supporting evidence.) Further, the State's brief argued, the classification as to gambling finds support in the recent publicizing of the fact that gambling not only has an evil effect upon persons who are its victims, but, through the manipulations of those who conduct it, it tends to corrupt our political institutions. The State also argued that "the Appellant's contention really resolves to the difficult balancing of the right of persons to be secure in their privacy against the social need that the criminal law shall be enforced." (Page 8 of the State's brief in support of its motion to dismiss this appeal.)

No matter how the State may twist or shape the argument it remains crystal clear that every assumption of fact which it makes to support the challenged classification requires the further assumption that Chapter 704 of the Acts of 1951 meets the suggested evil by "authorizing" the police, through a sort of "negative direction", to ignore the constitutional immunities and to invade the privacy of the citizens of Anne Arundel County at will. Indeed,

the State's Attorney and police of Anne Arundel County as well as the trial court proceeded upon this latter pernicious assumption that the challenged statute gave the police the "right" to break down Appellant's door with an axe (R. 5, 7, 8).^{*} No longer need the police of Anne Arundel County concern themselves with the procurement of a search warrant, for which full and adequate provision is made under the laws of the State of Maryland. (Art. 27, secs. 328, 329, Md. Code, 1951.) In short, the State's argument resolves itself into an assumed legislative intention, which may be thus expressed: "We want to retain the constitutional immunities of the citizens of all other parts of the State because the shoe of protection is a comfort to us there, but we want to be rid of them in Anne Arundel County because the shoe pinches us there."

As thus applied and interpreted, the challenged statute, through a sort of "negative direction", contains the kind of "affirmative sanction" to override the constitutional barrier which violates the Due Process Clause of the Fourteenth Amendment. *Wolfe v. Colorado*, 338 U. S. 25 (1949). (See *Ex Parte Rhodes*, 79 So. 462 (Ala. 1918), where the invalidated statute, as construed by the Court, contained an affirmative authorization to arrest and search and seize

^{*} At page 5 of the Record it appears that the Trial Court, in stating the question before it on the Appellant's motion to suppress the evidence, said:

"* * * If they [the police] had a *right*, assuming that the Bouse Act had been amended and that amendment is validated, they wouldn't have to worry about a misdemeanor or the commission of any kind, they would have a *right* to go into the premises on the assumption the amendment of the Bouse Act gave them that *right*" (Italics supplied).

At page 7, Police Captain Wade testified: "How did you get the door open? A. We forced it open with an axe. * * * (p. 8) * * * Captain, based on these telephone wires, leading to this building, on the basis of this information, you broke into this room, is that right? A. Upon the advice of the State's Attorney."

in misdemeanor cases even though the offense was not committed in the presence of the officer.) It is true that the Wolfe case held that the "ways of enforcing" the constitutional immunity against unreasonable search and seizure do not involve any question of due process; but it was also expressly declared in that case that since the security of one's privacy against arbitrary intrusion by the police is basic to a free society, it is implicit in the concept of ordered liberty, and as such, enforceable against the States through the Due Process Clause. "Accordingly", said Mr. Justice Frankfurter, who wrote the majority opinion, "we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment" (338 U. S. at 27, 28).

The State seeks to overcome the barrier of the Wolfe case by disclaiming for the challenged statute any intention to confer a "right" to search and seize in violation of the constitutional immunity. The State does not deny that the obvious effect of the statute, as clearly demonstrated by the Record in the case at Bar, is to incite and encourage the police of Anne Arundel County to ignore the constitutional immunities of the citizens of that County at will in cases of suspected gambling. It argues, however, that this incitement and encouragement to the police is not the kind of "affirmative sanction" which this Court condemned in the Wolfe case because it is inherent in the state rule of admissibility which this Court sustained in that case as not offensive to the Due Process Clause. The fallacy of the State's argument, however, lies in the fact that the case at Bar does not involve a contest between the federal rule of exclusion and the State rule of admissibility. Nor does it involve a question of "balancing of the right of persons to be secure in their privacy against the social need

that the criminal laws be enforced." Here we are confronted with class legislation, and the State is urging the necessities of effective policing as the "reasonable ground of difference" to support the discrimination involved. On this basis the legislation now attacked would be utterly meaningless as a proposed remedy for the evils assumed and as a balance between the rights of the citizen and enforcement of the criminal law unless its clear and unmistakable purpose was to free the police from constitutional restraints and thus lessen the difficulty of convicting persons charged with crime by encroaching upon these restraints. Here the "relation to the object sought to be accomplished" is patently grounded upon the assumed "right" and "direction" to search and seize in violation of the constitutional immunity. This is forbidden under the doctrine of the Wolfe case. The means to the otherwise justifiable end is thus illegal, and it cannot be considered just and reasonable for the purpose of supporting the challenged classification. If full force be given to the State's disclaimer of a "right" and "direction" to search and seize without regard to the constitutional immunity, then the challenged statute and the classifications it makes are utterly pointless and without any imaginable relation to the admitted legislative objective of facilitating the apprehension and conviction of suspected gamblers in Anne Arundel County.

Another weakness in the State's belated assignment of "reasons" for the challenged statute lies in its utter failure to explain the patently unequal application of the law within the borders of Anne Arundel County in view of the fact that persons charged there with violating the local gambling laws or the state-wide lottery laws are still protected by the statutory rule of exclusion of illegally procured evidence.

III.

Rules of Evidence are not Immune From Applicable Constitutional Limitations.

The Court of Appeals of Maryland, in making the erroneous application of the doctrine announced in *Missouri v. Lewis*, 101 U. S. 22, to which reference has already been made in this brief, laid great stress upon the fact that the challenged "statute does no more than prescribe a rule of evidence" (94 A. 2d at 284). The Court completely ignored the statement contained in 2 Cooley, Const. Limitations (8th Ed.) pp. 768-769, which had been called to its attention, namely, that "there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence * * * its authority is practically unrestricted, so long as its regulations are impartial and uniform." (Italics supplied.) Rules of evidence have never been regarded by this Court as immune from applicable constitutional limitations. In striking down a Missouri test oath in *Cummings v. Missouri*, 4 Wall. 277 (1867), Mr. Justice Field, speaking for this Court, said:

"The clauses in question subvert the presumptions of innocence and alter the rules of evidence, which heretofore, under the universally recognized principles of the Common Law, have been supposed to be fundamental and unchangeable."

A closer analogy is to be found in those cases which have dealt with statutory rebuttable presumptions. Thus in *Mobile, etc. R.R. Co. v. Turnipseed*, 219 U. S. 35, 43 (1910), this Court said:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate

fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." (Italics supplied.)

(See also, 4 Wigmore on Evidence (3rd Ed.), sec. 1356, pp. 724, et seq.)

The two cases which bear the closest analogy to the case at Bar involved a discriminatory rule of evidence, but the Court of Appeals of Maryland, relying upon other decisions clearly not in point, expressly refused to follow them (94 A. 2d at 284).^{*} These cases were decided by the New York

^{*} Instead, the Court, in addition to *Missouri v. Lewis*, relied by way of analogy upon *Davis v. State*, 68 Ala. 58 (1880); *People v. Hanrahan*, 75 Mich. 611 (1889); and *Ohio, ex rel. Libby v. Dollison*, 194 U. S. 445 (1904). The Court declared that these authorities stand for the general proposition that the equal protection of the laws is not denied by statutes which declare that certain acts are criminal in some counties but not in others (94 A. 2d at 285). An examination of these authorities will disclose that they are not in point and do not support the underlying *ratio decidendi* of the decision of the Court of Appeals of Maryland in the case at Bar, which is that there is no necessity for a finding of reasonableness in a territorial classification which purports to regulate judicial procedure in various parts of the State because the Equal Protection Clause of the 14th Amendment has no application to such regulations. Thus in *Davis v. State*, the Alabama Court expressly referred to a reasonable basis for the statute which made it unlawful within certain counties to transport any cotton in the seed after sunset and before sunrise of the succeeding day. The Court said (see p. 63 of 68 Ala.):

"Its object is to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which in the opinion of the law-making power may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment, at least within the specified territory."

People v. Hanrahan, did not involve a statute making acts criminal in one County and not in others. The statute in question involved a Home Rule provision of an Illinois Act which granted power to the City of Detroit to prohibit houses of ill fame in that City and to prescribe the penalty for violation of any ordinance passed pursuant thereto. The ordinance passed pursuant to the enabling act was sustained although it prescribed a different penalty

Appellate Division, First Department. The first is *Krushel v. Ladutko*, 11 N. Y. S. 2d 747 (1939), aff'd. on other grounds 281 N. Y. 655. The second is *Commissioner of Public Welfare v. Torres*, 31 N. Y. S. 2d 101 (1941). In the *Ladutko* case, the Court had before it a statute which in substance provided that in Paternity Proceedings in New York City, the mother of the "natural child" and her husband shall be permitted to testify to non-access. The common law rule, rendering such evidence inadmissible, applied elsewhere in the State of New York. In holding the statute a violation of the Equal Protection Clause of the 14th Amendment, the Court said, at p. 749:

"The statute which undertakes to effect a change in the common law rule by allowing such proof within the City of New York while such testimony is still inadmissible in the rest of the State, is based upon no reasonable ground for the distinction it makes. * * * This differentiation within the borders of the State should be based upon reasonable grounds. [Citing cases, including *Missouri v. Lewis*.] The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. * * * Here there appears to be no just or rational basis for the distinction made by the statute in question, and it is * * * unconstitutional."

In the *Torres* case an amendment to the Domestic Relations Law of New York provided in effect that in Paternity Proceedings conducted in New York City testimony of non-

than was prescribed by the state-wide law against maintaining houses of ill fame.

Ohio, ex rel. Lloyd v. Dollison, involved a local option law regulating the liquor traffic in a certain township. It has long been settled that such laws are in a different category as "the state has absolute power over the subject. It does not abridge that power by adopting the form of reference to a local vote". (See *Rippey v. Texas*, 193 U. S. 504, 510.)

access by a person other than the defendant must be corroborated. In other parts of the State, the statute permitted such testimony without corroboration. In striking down this statute the Court rejected population differences as a basis for sustaining the classification and said, at p. 104:

"But the discrimination herein cannot reasonably be construed as affecting an evil that exists only in one City of the State and has no existence in all other parts of the State."

The law is thus clear that classification in the field of remedial evidentiary rules must be supported by some reasonable ground of difference which justifies applying one rule of evidence in a single county and an altogether different rule elsewhere in the State in identical cases. Wherein lies a distinction between suspected gamblers which would justify applying one rule of evidence to some of them and another rule to others merely on the basis of the City or County in which they are suspected of gambling? Is the challenged statute the "one rule for rich and poor, for the favorite at court and the countryman at plough" of which Locke speaks (Locke on Civil Government, sec. 142) when the "favorite" of the City is sent home free because the evidence was illegally procured and the "countryman" of Anne Arundel County is imprisoned on the same evidence?

IV.

The Second and Third Classifications Inherent in the Challenged Statute Involve Arbitrary and Unreasonable Discrimination Between Classes of Persons in Anne Arundel County who are Similarly Situated and who are Thereby Denied the Equal Protection of the Laws.

Aside from the unreasonableness of the primary territorial classification of the challenged statute, the secondary

classification whereby "gambling" is selected for discriminatory treatment from the great body of misdemeanors is a clear denial to Appellant of the equal protection of the laws. By virtue of the challenged statute, one charged in Anne Arundel County as an operator of a bawdy house or an illegal still or as having conspired with another to commit the most heinous crime (all misdemeanors under the law of Maryland) is protected in the full enjoyment of his constitutional immunities, while a citizen charged with gambling in Anne Arundel County is beyond the pale of this same full protection. With relation to the subject matter at Bar, it is impossible to conceive any rational difference between particular classes of misdemeanants in Arundel County which would support the discrimination against suspected gamblers. The Court of Appeals of Maryland certainly did not find or even suggest any such difference. Indeed no one would suggest that bootleggers, bawdy house operators and conspirators are easier to catch and convict in Anne Arundel County than gamblers, even if such a consideration could properly be employed to sustain the kind of discrimination involved in the challenged statute.

In *Commissioner of Public Welfare v. Koehler*, 30 N. E. 2d 587 (N. Y. 1940), a state-wide statute permitting evidence in Paternity Proceedings of non-access by the husband of the mother of a "natural child" was sustained even though in other types of cases such evidence is excluded by the applicable common law rule. The Court said, at p. 591:

"It is not unreasonable that in a statutory proceeding to enforce a duty imposed by statute upon the father of a 'natural child' the mother of the child and her husband should be permitted to give testimony which they would not be permitted to give where an adjudication of the status of the child is sought. * * *

the foundation of the rule is much firmer when it is invoked for the protection of the child or of the parties to the marriage or of the public, than when invoked as a shield by an alleged adulterer against liability for the consequences which follow from his wrong."

The *Koehler* case clearly demonstrates the necessity for and the kind of rational basis which is required to sustain the application of one rule of evidence to a particular class of cases and a different rule to other cases. In the absence of such a reasonable basis for the discrimination, the rule of evidence would be lacking in that degree of impartiality and uniformity which is essential to its constitutional validity. See Cooley, *Const. Limitations* (8th Ed.), vol. 2, pp. 768-769. In the case at Bar there is no reasonable difference between various categories of misdemeanants in Anne Arundel County which would justify the admission of illegally procured evidence against one and its exclusion against all others. All misdemeanants in Anne Arundel County are in the same class. Here, indeed, is the very discrimination "between persons or classes of persons within the municipalities or counties for which such regulations are made" which the Court of Appeals of Maryland, in its lip service to the requirement of "reasonableness", conceded ran counter to the 14th Amendment. 94 A. 2d at p. 284, *supra*.

The arbitrary and discriminatory operation of the challenged statute is even more forcibly demonstrated when we consider the third classification which is involved. The exempting provision of the statute applies in Anne Arundel County only "in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." (Italics supplied.) Art. 35, sec. 5, Code of Public General Laws of Mary-

land, 1951 edition. The italicized reference is to the state-wide gambling laws, exclusive of the sections which prohibit lottery.⁹ Under public local laws enacted by Chapters 271 and 290 of the Acts of 1898 and applicable only to Anne Arundel County, it is made a misdemeanor to wager or make book on the result of any horse race in Anne Arundel County or to wager at any game played with dice in that County. Art. 2, secs. 292, 293, Code of Public Local Laws of Maryland, 1930 edition. (Also codified in Flack's Code of Public Local Laws of Anne Arundel County (1947) as secs. 338, 339.) Thus, if the offender is charged in Anne Arundel County with a violation of the local gambling laws he is sent home free because the evidence was illegally procured, but if he is there charged with violating the state-wide gambling laws he is imprisoned on the same evidence. In addition, the exempting proviso is limited to violations of sections 303-329, which proscribe book-making and certain other forms of gambling, but do not include lottery. Lottery operations are proscribed by sections 423-438, 642-651 of Article 27, Maryland Code, 1951. Thus in Anne Arundel County lottery operators are sent home free while book-makers are imprisoned on the same evidence. Here the discrimination is so patently arbitrary as to require no further illustration or argument.

V.

The Challenged Statute can Draw no Support or Vitality From a Mere Presumption of Validity.

In an attempt to bolster its decision, the Court of Appeals of Maryland referred in its opinion to the presumption of reasonableness and constitutionality which generally attends a legislative enactment (94 A. 2d at p. 284). Aside

⁹ For abstract of the forms of gambling proscribed by sections 303-329, see note 1, *supra*.

from any other considerations, such a presumption cannot save a statute, such as the one at Bar, which proposes a classification manifestly and obviously arbitrary and unreasonable on its face. It was expressly so held in *Bailey v. Drexel*, 259 U. S. 20, 37, 38. See also 2 Sutherland, *Statutory Construction* (3rd Ed.) sec. 4509. The rule is the same in Maryland.¹⁰

In the case at Bar the subject matter of the challenged statute impinges upon one of the most fundamental immunities of the citizen, namely, the right to be secure in one's privacy against arbitrary intrusion by the police. As was said in *Wolfe v. Colorado*, 338 U. S. 25, at pp. 27, 28 (1949):

"* * * It is, therefore, implicit in the 'concept of ordered liberty' and as such, enforceable against the States through the Due Process Clause. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Where the subject matter of a challenged statute deals with one of the fundamental immunities of the citizen it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation. *United States v. C. I. O.*, 335 U. S. 106, 140 (1948); *Ex Parte Endo*, 323 U. S. 283, 299 (1944); *Byars v. United States*, 273 U. S. 28, 32 (1927); *Ex Parte Rhodes*, 79 So. 462, 464, 465 (Ala. 1918), quoting Justice Bradley in *Boyd v. United States*, 116 U. S. 616; "*The First Ten Amendments*",

¹⁰ Thus see *State v. Potomac*, 116 Md. 380 (1911); *Kelman v. Ryan*, 163 Md. 519 (1933); *Dasch v. Jackson*, 170 Md. 251 (1936); and *Blaustein v. State Tax Commission*, 176 Md. 423 (1939), where discriminating legislation was invalidated on the pleadings because the proposed classification was manifestly arbitrary and unreasonable on its face.

by Paul G. Kauper, 37 Amer. Bar Asso. Jr. 717, 718 (1951); *American Jurisprudence, Const. Law*, secs. 59-60. The statute involved in the case at Bar is such a statute, and it can draw no support or vitality from a mere presumption of validity.

CONCLUSION

It is respectfully submitted that the Court of Appeals of Maryland has misconstrued and misapplied the decision of the Supreme Court in *Missouri v. Lewis*, 101 U. S. 22 (1880) and other relevant and controlling decisions. The challenged statute is unconstitutional and void because the discriminations it purports to make do not rest upon any reasonable basis which bears a legitimate relation to the evil sought to be corrected. The admissibility of the evidence upon which Appellant stands convicted was dependent upon the constitutional validity of the challenged statute. Accordingly, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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